



March 8, 2017

Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Re: Streamlining Deployment of Small Cell Infrastructure by Improving Wireless
Facilities Siting Policies - WT Docket No. 16-421

Dear Ms. Dortch:

The City of Rochester, New York submits these comments in response to the Petition of Mobilitie, LLC for a Declaratory Ruling interpreting Section 253(c) of the Communications Act of 1934 (47 U.S.C. §253c), to urge the Commission to decline Mobilitie's request to restrict compensation under §253 to costs of managing the right-of-way, as well as its other requests. The City of Rochester is a medium sized city located in western New York, with a population of approximately 210,000. While boasting a high concentration of area colleges and universities, including the University of Rochester and Rochester Institute of Technology and a growing high technology sector, especially in the area of imaging and optics, the City also suffers from one of the highest rates of urban poverty and has one of the lowest high school graduation rates in the country.

These disparities make our City keenly aware of and concerned about the issues which are before the Commission: the importance of encouraging high quality telecommunications services for our residents, businesses, educational and other institutions while protecting the City's valuable public resources, including its right-of-way, for the benefit of its taxpayers. Without question, the City of Rochester, and it is safe to say that virtually every city in the country, recognizes the importance of broadband deployment and realizes that our City will be left behind in terms of jobs, growth and economic development if we do not encourage the expansion of telecommunications infrastructure.



Rochester has in fact encouraged and facilitated such infrastructure growth for many years and without legal challenge, through reasonable and expedited review procedures under its Zoning Code, for applications for cell towers, antennas and related equipment located on private property. In addition numerous applications for telecommunications facilities in the public right-of-way, until recently primarily underground fiber optic cable and related facilities, have been approved through the City's permit process, pursuant to Chapter 104 of the Code of the City of Rochester, the "Streets Code". Unlike many cities, the City of Rochester does not apply its Zoning Code requirements to its right-of-way, so no zoning approval is required for telecommunications infrastructure applications in the right-of-way.

Most recently, the City has been inundated with the latest phase of telecommunications applications, for small cell antennas on poles in the right-of-way. The first of these applications came from the wireless telecommunications infrastructure company, ExteNet. Our staff first met with company representatives in late April 2015 for an informational meeting, initial plans were submitted by ExteNet in late August, 2015, Rochester City Council approved a right-of-way agreement with ExteNet in September 2015, the agreement was executed in November 2015, final plans and documents for the completed permit application were submitted by ExteNet in May through June 2016 and the first permits were issued at the end of June, 2016. Although the City's full review and approval process was approximately ten months, including the technical permit review pursuant to our Streets Code, drafting and negotiating the agreement and approval of the agreement by City Council, the permits were issued within days or a couple of weeks from submission of final completed specifications and plans. We were able to complete this expedited review process because the initial number of applications was relatively small and in a concentrated downtown, primarily commercial area, allowing us to review and resolve legal and technical issues quickly. We demonstrated the City's desire to encourage and facilitate telecommunications infrastructure development for the benefit of our residents, institutions and businesses.

With our next applicant for small cell antenna installations, Crown Castle, a new issue was identified, notification to and involvement of neighbors, as the proposed facilities were located in and near a residential neighborhood. Although the review process was extended by a couple of months, with the City's help, Crown Castle held neighborhood meetings, which resolved neighborhood concerns, resulted in a number of changes to Crown Castle's plans and eliminated opposition when the proposed Right-of-Way agreement with Crown Castle was later submitted to City Council for approval. Having learned from our experiences with ExteNet and because of some technology differences, we also made several changes to the permit approvals and right-of-way agreement with Crown Castle.

Currently we are negotiating an agreement with Mobilitie and will begin a formal review of their permit application, which is currently being revised, once the application is complete. However, their preliminary application raised new and complex issues, not

addressed in the two prior applications, as the result of a different technology used by Mobilitie. While the backhaul for the ExteNet and Crown Castle antenna systems involves use of underground fiber, Mobilitie proposed to install new poles with microwave antennas, including multiple 120' poles, poles that are more than three to four times the height of our typical street lighting, and to put this in perspective, the height of a ten story building. Not only does the City have a long standing policy of not allowing any new poles in our right-of-way, for reasons of traffic safety, street and sidewalk maintenance, aesthetics and pedestrian and handicapped accessibility, these excessively high structures pose additional health and safety concerns related to snow and ice buildup, excessive excavation requirements and the extreme fall line of the poles.

It is these issues, critical to the City of Rochester's obligation and right to manage its right-of-way, that have caused us to take necessary additional time in our permit approval process. As we suspect has happened in many cities across the country, we have been overwhelmed with applications for small cell antennas and realize that this is just the beginning. With each new applicant, we have encountered new issues and realized that we don't have the City Code language, the in-house knowledge or the staff to deal with this latest wave of telecommunications technology. We have had to retain outside expert consultants, we are in the process of amending our City Code, we are revising our permit fees to address the increased staff time being devoted to these applications- we don't currently have a permit fee specifically for pole attachments- and we are spending hours of time both in our legal and engineering departments, researching multiple issues, especially to learn what other cities are doing.

Mobilitie underestimates the impact of its equipment and describes its facilities as "extremely small equipment that can be easily located on street lights and utility poles that already occupy the rights of way The reduced size and weight of small cell equipment generally does not pose loading problems for most rights of way structures. Many types of small cell antennas extend no more than a few feet in any direction..." (page 11 of Petition). This is simply not true. It has been the City of Rochester's experience with one of its providers that every single street lighting pole had to be replaced because of loading problems. Poles that were sufficient to hold our street lights were not sufficient to hold the antennas and other required equipment. The nature of this equipment, which varies from pole to pole and from provider to provider, requires the City to review every pole attachment application separately, to ensure that there are no loading problems and that the attached equipment will not pose a hazard to pedestrians or drivers and will not impact City right-of-way maintenance. We are not just reviewing the small, relatively unobtrusive cylindrical antenna mounted at the top of a pole, but the often multiple pole and ground mounted boxes and equipment cabinets, which may create noise, may contain potentially hazardous batteries or other equipment, and which encroach on the public right-of-way to the detriment of pedestrian and particularly handicapped access.

While we understand the urgency that the telecommunications infrastructure companies feel to build out for their cell company clients, and we recognize the FCC's mission to encourage this development, there must also be a recognition that municipalities have a right and obligation to protect their rights-of-ways, that this new technology is complicated and still changing and that it raises many issues that are important to public health and safety. Municipalities are not trying to impede progress as suggested by Mobilitie, only to perform their governmental responsibilities.

In addition to the responsibility for physically maintaining its right-of-way, the City of Rochester has an obligation to its taxpayers, including its many low income residents, to protect its public assets, including the public right-of-way, and to be fiscally responsible in managing these assets. The street lighting poles on which Mobilitie and other providers seek to locate their small cell equipment and facilities are a valuable public asset. In 2007 the City of Rochester completed the acquisition of our street lighting system from our local utility, Rochester Gas and Electric. This acquisition process started in the mid-1980's and culminated in 2007 with the purchase of the remaining 16,000 street lights, for a final payment of approximately \$7.3 million, every penny of which was paid by taxpayers.

Mobilitie is a multi-national corporation headquartered in Newport Beach California, with international offices located in Panama City, Tokyo and London. It is, according to their website, the largest privately held telecommunications infrastructure company in the United States. Mobilitie essentially argues that municipalities are being greedy by imposing fees that are "set to recover what locations believe the market rate is for the use of their rights of way so they can profit from it" (page 16 of Petition), a disingenuous argument given that the costs that Mobilitie complains about are almost certainly about the impact of these fees on its profit margin. However, recognizing that they are a corporation reasonably concerned about the "bottom line", the Commission is urged to recognize that municipalities also have a bottom line and that is fiscal responsibility and legal obligations to their taxpayers.

In New York State, it is constitutionally prohibited for municipalities to give away public property. "(N)o county, city, town...shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking..." NYS Constitution, Article VIII, §1. The City of Rochester's right-of-way, including specifically its street light poles, is property owned by the City of Rochester. That it has actual, quantifiable value is demonstrated by the recent over seven million dollar payment by the City for the street lights. The City is constitutionally prohibited from giving this valuable property to private corporations, such as Mobilitie and the other telecommunications infrastructure builders and the only way that the City can sell or lease its property is to establish the reasonable market value of that property. It is not a question of municipalities "profiting" from the use of their rights-of-ways, as argued by Mobilitie, but of municipalities receiving fair and reasonable compensation, as authorized by the Communications Act, for the use by private competitive entities of a

valuable publicly owned asset. Mobilitie should not expect the City of Rochester to give away its property anymore that it would expect a private property owner to give it free space on private property.

Mobilitie argues that municipalities should be restricted to their actual costs and expenses when imposing fees. The City of Rochester's permit fees are intended to recover from permit applicants, all administrative costs, including inspections, document and plan reviews by staff and other permit processing costs, so that it is the permit applicant, not the general taxpayer that is paying the permit costs. Permit fees are reimbursement to a municipality for the actual costs incurred to process an applicant's permit. The fees that the City imposes for the use of its right-of-way, including underground fiber facilities and above ground attachments to street lighting poles, are a separate and distinct charge, as fair and reasonable compensation, in the form of lease fees for use of this public property, which as discussed above must be paid to the City and cannot be given away. The City of Rochester urges the Commission to refrain from restricting the rights of municipalities to require fair and reasonable compensation, as that term is commonly understood, to allow compensation for the use or lease of municipal rights-of-way, and not to limit municipalities to minimal permit fees or actual costs.

Mobilitie paints a picture of the importance of new wireless infrastructure, not only for current demand but for the soon to arrive 5G technologies with which we fully agree, but urges the Commission to ensure that this infrastructure will be built by restricting the rights of municipalities to manage the right-of-way and obtain fair and reasonable compensation for the use of the right-of-way, by limiting compensation to a municipality's actual costs. They argue that cities around the country are threatening this critical broadband expansion. However, this is simply an issue of the market value of the private use of public property. Although there may be a few cases of excessive fees, shouldn't the market be allowed to resolve that problem? The vast majority of cities are doing their best to address this new technology, with all its impacts on the right-of-way and to properly assess the value of their public property so they can charge fair and reasonable compensation for its use. The Commission should not interfere in this process and should allow the issue of compensation to be resolved between two parties to the transaction.

During the first phase of cellular technology, the construction of thousands of cell towers and antennas on private property around the country, there was no suggestion that these private property owners should give away their property to the cellular companies. In this second phase of cellular infrastructure development, small cell and DAS deployment, Mobilitie and its competitors have concluded that it is too time consuming and too expensive to negotiate with private property owners and that their new facilities, as they have now designed them, must be installed in the public right-of-way, for free, except for the minimal permit costs. When our staff recently suggested to

a Mobilitie spokesperson that as part of their application for the 120' poles we need information about alternative locations off the right-of-way that they had considered, we were simply told that that was not "in their business plan" to consider such locations. If the costs of the cellular infrastructure deployment, including the leasing of municipal property for installation of equipment, increases, the market will adjust and users of cellular services will pay what it costs to bring them the service, not a reduced cost subsidized by low income city taxpayers.

In addition to the amount of the fees it challenges, Mobilitie criticizes the form of annual fees and the fees based on a percentage of gross revenue, the model that the City of Rochester uses. They argue that it is unfair the pay an annual fee, but if the provider's equipment and facilities remain on City light poles from year to year, it difficult to understand why it is unfair to require them to pay an annual lease fee. They also complain that some of the municipal fees are required to be paid before they have received any revenues, yet they also complain about the payment of a percentage of gross revenue, which precisely addresses that concern, as they will not be required to pay that fee amount until they actually generate revenue from the use of those poles.

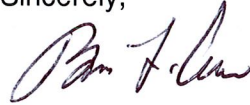
Finally Mobilitie asks the Commission to rule on two issues that the City of Rochester believe are adequately addressed in the clear language of the Communications Act and do not require guidance by the Commission. Mobilitie cites Section 253(c) language that prohibits right-of-way charges that are not "competitively neutral and nondiscriminatory". This language appears to be clear, self-explanatory and as noted by Mobilitie, previously addressed by the Commission and does not require further clarification.

Mobilitie also urges the Commission to rule on the language in Section 253(c) that requires municipalities to "publicly disclose" the right-of-way fees that it charges. When Mobilitie requested the City of Rochester to provide them with the agreements that we had already executed with two of their competitors, ExteNet and Crown Castle, as a courtesy, the agreements were sent to them, even though as public documents, they would have been available through a Freedom of Information request. Virtually every applicant for a Freedom of Information request feels that the information they are seeking is important and should be available immediately. There is nothing unique or critical about companies that construct cellular telecommunications infrastructure and the goal of Section 253(c) can be met by timely Freedom of Information applications.

The Commission has been requested to adopt a declaratory ruling interpreting and clarifying Section 253(c) with respect to the terms "fair and reasonable compensation", "competitively neutral and nondiscriminatory" and the requirement that compensation must be "publicly disclosed". All of these statutory terms are clear and unambiguous and do not require the Commission's interpretation. If the Commission determines that it will provide clarification of any or all of these terms, the City of Rochester urges the Commission, at minimum, to allow municipalities to obtain fair and reasonable compensation for the use of their rights-of-ways based on the rental value of

the public property, as it is being used by private companies. Municipalities should not be restricted to fees that only cover their actual costs related to the right-of-way, as that does not reflect the value of this public property, it would not be fair and reasonable and such a result would amount to a public subsidy of private companies.

Sincerely,

A handwritten signature in dark ink, appearing to read "Brian F. Curran". The signature is fluid and cursive, with the first name "Brian" and last name "Curran" clearly distinguishable.

Brian F. Curran
Corporation Counsel
City of Rochester